

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

**RONDA MCGOWAN,**  
Personal Representative for Estate of  
Brian Babb, **LEE BABB, CONNOR**  
**BABB**, by and through Guardian ad  
Litem, **STEPHANIE WOODCOCK,**  
and **KAYLEE BABB,**

Plaintiffs,

v.

**WILL STUTESMAN, OFFICER GROSE,**  
**OFFICER PIESKE, Sgt. MCALPINE, CITY**  
**OF EUGENE**, a municipal subdivision of the  
State of Oregon, **JANE DOE CALL TAKER,**  
and **JOHN AND JANE DOES 1-10,**

Defendants.

Civ. No. 6:17-cv-00424-TC

**Findings and  
Recommendation on  
Defendants' Motion for  
Summary Judgment**

**COFFIN, Magistrate Judge:**

Plaintiffs have filed claims against defendants for relief under 42 U.S.C. § 1983 (federal claims) as well as a state law claim for wrongful death against Defendants Stutesman and the City of Eugene. Defendants have filed a motion for summary judgment (Document #31) against all claims. Former defendants Pieske and Grose have been voluntarily dismissed from the case, and the court has entered a stipulated judgment in their favor.

### **PRELIMINARY STATEMENT**

This case arises out of a fatal shooting of Brian Babb on March 30, 2015 by Eugene Police Officer Will Stutesman after police responded to an incident involving an armed suicidal subject (Babb) at the address where Babb resided. The central issue presented by defendants' motion for summary judgment is essentially whether the use of deadly force was justified as a matter of law based on the *undisputed* (emphasis supplied) facts of the case. Conversely, the question is presented whether material facts exist in the record that preclude summary judgment and necessitate a trial and findings by a jury regarding the facts underlying the events culminating in the fatal shooting

### **STANDARD OF REVIEW**

Federal Rule of Civil Procedure allows the granting of summary judgment: If the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c). There must be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The movant has the initial burden of establishing that no genuine issue of material fact exists or that a material fact essential to the nonmovant's claim is missing. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). Once the movant has met its burden, the burden shifts to the nonmovant to produce specific evidence to establish a genuine issue of material fact or to establish the existence of all facts material to the claim. *Id.*; *see also, Bhan v. NME Hosp. Inc.*, 929 F.2d 1404, 1409 (9<sup>th</sup> Cir. 1991); *Nissan Fire & Marine Ins. Co., Ltd. V. Fritz Cos., Inc.*, 210 F.3d 1099, 1105 (9<sup>th</sup> Cir. 2000). To meet this burden, the nonmovant "may not rely merely on

allegations or denials in its own pleading,” but must instead “set out specific facts showing a genuine issue of fact for trial.” Fed. R. Civ. P. 56(e).

Material facts which preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. *Anderson*, 477 U.S. at 248. Factual disputes are genuine if they “properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Id.* On the other hand, if, after the court has drawn all reasonable inferences in favor of the nonmovant, “the evidence is merely colorable, or is not significantly probative,” summary judgment may be granted. *Id.*

As noted, however, in addressing the defendants’ motion, the court must draw all reasonable inferences from the evidentiary record in favor of the plaintiffs.

### **STATEMENT OF FACTS**

On May 30, 2015, Officer Stutesman responded to a radio dispatch summoning all available officers to 2248 Devos “for a suicidal subject telling his therapist that he is armed with a nine-millimeter to his head.” While enroute to the residence, he was further informed:

We have a therapist on the line. They are talking to Brian Babb. Born in ’65. He is a veteran with PTSD. Sounds intoxicated and may be on pain meds. States he has a nine-millimeter to his head and has already shot one bullet into a window or somewhere in the house.

After Stutesman and other officers arrived in the vicinity, and stationed themselves at the scene, Defendant McAlpine (the commander of the response team) requested dispatch to ask the therapist, who had an open line with Babb, to request that he step outside with nothing in his hands. The dispatch responded, “She is just advising that he says he has a round loaded in the chamber and that it is ready to go.”

An armored police vehicle (the Bearcat) thereafter arrived and positioned itself near the driveway of a neighboring residence, with its front pointing towards the Babb residence. Officer Stutesman, armed with a rifle, entered the Bearcat and positioned himself inside a turret within the vehicle. Four other officers were also in or at the rear of the Bearcat: Pieske, the driver, Grose, a passenger, and DeWitt at the rear of the Bearcat, along with Sergeant McAlpine.<sup>1</sup>

Once the Bearcat was in position, Sergeant McAlpine advised dispatch and the officers listening: "We have positioned the Bearcat, and we're going to start hails here in a second."

Shortly thereafter, Officer Grose used his loudspeaker to announce:

Brian. 2248 Devos. This is the Eugene Police Department. We want to make sure everyone is safe today and nobody gets hurt. In order for that to happen we need you to come outside with your hands empty and in the air."

Brian. This is the Eugene Police Department. I need you to come outside with your hands empty so we can talk to you and help you out today.

Eugene Police Department. We don't want anybody to get hurt today.

Following the announcements, the front door to the house opened and Brian Babb's roommate, Jim Antonini, emerged from the house with his hands up in the air. Officer Kidd reported this development to dispatch as follows:

He is at the door. Hands are up. Stand by, He's waving his hand. I am not sure it is the same person. Got a white male at the door with his hands up, blue sweatshirt, blue shorts, coming out. He is not Brian. It is Jim . . . Jim is coming out with his hands up. He is saying he is here to try and help Brian. The friend, Jim, is coming out the driveway. Front door is still open. (Exhibit 3).

Shortly before Antonini came out of the house, Babb had appeared at the front door, without any weapon in his hands, and he yelled at the officer before slamming the door. After Antonini emerged and was interrogated by officers, he advised them that Babb had access to

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<sup>1</sup> Pieske and Grose were initially named as defendants but have been voluntarily dismissed from the lawsuit.

rifles that were in a safe in the house. Officer Grose again used the loudspeaker to urge Babb to come out of the house with his hands up:

Brian. This is the Eugene Police Department. We're outside. We want to help you out. Hey Brian. We want to help you out. We want to talk. That is why we are here. Come outside so we can help you.

Brian. My name is Matt. I am with the Eugene Police Department. We don't want to hurt you. We don't want you to hurt yourself . . . Come outside, with your hands empty and in the air. We can work this out.

At this point, Officer Stutesman was standing in the turret with his rifle pointed towards the front of the house. The door opened, and Babb appeared in the doorway. According to Stutesman's account, Babb had a rifle which he raised to the firing position and aimed directly at Stutesman, who immediately yelled "Drop it. Drop it." Babb nonetheless continued to aim at Stutesman, who concluded that Babb was going to shoot him and who then fired one shot, fatally wounding Babb.

The plaintiffs dispute Officer Stutesman's account of the shooting, challenging his credibility about whether Babb possessed a rifle when he appeared in the doorway or, if so, whether he had aimed at Stutesman prior to being shot and killed.

Regarding whether Babb possessed a rifle when shot, plaintiffs cite evidence that no other officers or witness at the scene observed him with a rifle, including Officer Kidd who had positioned himself on a neighbor's roof to observe the front door. Whether this was because their view was obstructed (the position of the defendants) or because Babb did not have a rifle (the position of plaintiffs) is a disputed issue of fact.

Plaintiffs also contend that after the shooting and prior to any photos or video evidence being taken of the scene, officers had access to Babb's residence and sufficient time (over six minutes) to retrieve a rifle therein and place it outside the front door. Defendants deny that the



rifle was planted near Babb's body after the shooting and cite the following evidence in support of their contention that Babb had the rifle when he opened the front door and appeared in the doorway immediately prior to being shot:

- 1) A neighbor eyewitness has testified that, although she did not see a rifle, she saw "a shoulder strap of something on him."
- 2) Approximately six minutes after the shooting, the Bearcat broke through two wooden fences and arrived at the front door of the Babb residence. The video from the Bearcat shows Babb's body in the doorway and an object on the porch that is not clearly in focus but is consistent with an image of a rifle.<sup>2</sup>
- 3) Plaintiffs' theory that certain police officers accessed the Babb residence from the back of the house by climbing over a backyard fence during the six-minute interlude between the shooting and the arrival of the Bearcat at the front door is contradicted by comparing a live radio dispatch of the fence climbing with the Bearcat video. According to defendants, this results in a calculation of nine minutes and fifteen seconds after the shooting before the officers climb the fence, or three minutes after the Bearcat is at the front door and recording an object on the porch that defendants contend is the rifle.
- 4) The Bearcat video shows Officer Dewitt taking photos of the scene, including around the front porch, and he identifies photos of the rifle as among the photos he took while the Bearcat video was recording.

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<sup>2</sup> The Court has viewed the video which the city submitted as an exhibit in support of its motion for summary judgment.

- 5) Officer Stutesman had an unobstructed view of the front door and it is his testimony that Babb possessed the rifle when he appeared in the doorway.

All of this is relevant and probative evidence on the issue of whether Babb possessed a rifle when he appeared in the doorway. But the presence of admissible evidence in favor of one party or the other does not necessarily equate with “undisputable” evidence such that the Court must find as a matter of law in favor of that party. Here, for example, there is a question presented on what the neighbor actually saw—i.e., whether it was a strap that was attached to an unseen rifle or something else. Plaintiffs are entitled to cross-examine her and it is the function of the jury not the court, to make appropriate findings from her testimony.

Similarly, plaintiffs question the defendants’ calculations on the time lapse between the fatal shot and the officers accessing the rear of the house by going over the backyard fence. Again, plaintiffs have the right to challenge the defendants’ calculations through cross-examination and other evidence. There is much more in the way of circumstantial evidence in this case, as demonstrated by defendants’ meticulous detailing of the Bearcat video, radio dispatches, witness accounts, photographs taken after the shooting, and the inferences that a fact finder may reasonably draw from the cumulative effect thereof. But while circumstantial evidence is just as admissible and probative as direct evidence, it implicates a process where the trier of fact makes findings by drawing reasonable inferences from facts proven to the jury’s satisfaction by the evidence at trial. That process is the function of the jury, not the court.

Moreover, the issue of whether Babb possessed a rifle when he appeared in the doorway is only part of the equation in determining whether Officer Stutesman was justified in his decision to use deadly force. A critical question is also presented, assuming a jury finds he did possess the rifle, whether he aimed it at Officer Stutesman and thus placed him or others in

imminent danger of serious bodily injury or death. *See Graham v. Connor*, 490 U.S. 386, 397 (1989); *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013). On that subject, Officer Stutesman's testimony and statements<sup>3</sup> are of paramount importance and plaintiffs must be allowed the opportunity to challenge his testimony through cross-examination and other evidence at trial. As noted previously, plaintiffs cite evidence that no other witnesses at the scene clearly observed Babb in the doorway or saw him aim a rifle at anyone. Thus, Officer Stutesman's credibility is critical to this issue and the Court may not make credibility assessments on a motion for summary judgment. That is a task that is allocated to the trial jury.

As the court noted in *Booke v. County of Fresno*, 98 F. Supp. 3d 1103 (E.D. Cal. 2015):

Whether a suspect poses an immediate threat to the safety of the officers or others, i.e. the immediacy of the threat posed by a suspect, is the most important factor in evaluating excessive force. In excessive force cases in which a death results, the Ninth Circuit has cautioned that summary judgment is to be granted sparingly and that the entirety of the evidence is to be carefully examined because often times the only surviving witnesses to the use of force are the defendants.

*Booke*, 98 F. Supp. 3d at 1119 (citation omitted).

### **RECOMMENDATION**

Thus, the first claim for relief against defendant Stutesman under § 1983 for unreasonable use of force should be allowed to proceed to trial and that portion of defendants' motion for summary judgment should be denied. For the same reasons as set forth above, the second and third claims for relief against defendant Stutesman under § 1983 alleging violations of

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<sup>3</sup> Defendants cite Stutesman's simultaneous and recorded statement as being admissible "excited utterances" as an exception to the hearsay rule. While such may be admissible, it is nonetheless the function of the jury to weigh them in deciding the facts.



substantive due process rights of decedent's parents and children should be allowed to proceed to trial and that portion of defendants' motion for summary judgment should likewise be denied.

The plaintiffs do not oppose the defendants' motion for summary judgment on the fifth claim<sup>4</sup> for relief against the City of Eugene under *Monell*. Accordingly, that part of the motion should be granted.

The plaintiffs' sixth claim for relief alleges constitutional violations against Sergeant McAlpine under § 1983 for "failure to supervise." In essence, this claim alleges that McAlpine, as the supervising officer on the scene, was responsible for the placement of the officers, the escalation of force, the interruption of calls between Babb and his therapist, poor communication between police dispatch and the therapist, failing to establish good communication with Babb, and encouraging the escalation in the show of force "which caused the resulting shooting." Plaintiffs contend that McAlpine failed to contact Babb's therapist although he knew he was dealing with a suicidal subject, failed to comply with his crisis intervention training (CIT), did not instruct officers under his command regarding CIT tactics, developed and oversaw a plan of approach to Babb's residence that utilized an armored tank-like vehicle, and positioned officers (including Stutesman) in sniper positions.

Plaintiffs further contend that after Antonini safely emerged from the house leaving Babb alone in the residence, McAlpine should have but failed to disengage the snipers from their positions and pull them back. Plaintiffs thus argue that McAlpine can be held liable for the fatal shootings of Babb because a sufficient causal connection can be shown between a supervisor's conduct and a constitutional violation if the supervisor sets in motion a series of acts by others,

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<sup>4</sup> There is no fourth claim for relief in the complaint.

or knowingly refuses to terminate a series of acts by others, that the supervisor knew or reasonably should know will cause others to inflict a constitutional injury, or if the supervisor's own culpable action or inaction in the supervision or control of his subordinates led to the injury. *See Dubner v. City and Cty. of San Francisco*, 266 F.3d 959, 968 (9 Cir. 2001); *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998); *Booke v. County of Fresno*, 98 F. Supp.3d 1103, 1129 (E.D. Cal. 2015).

The alleged constitutional violation here is the fatal shooting of Brian Babb by Officer Stutesman, should the jury find that use of deadly force was not justified by the circumstances (e.g., if the jury finds Babb either did not possess a weapon or did not aim it at Stutesman). Clearly, McAlpine cannot be found liable on the performance of his supervisory duties if there was no constitutional violation of Babb's rights by Stutesman (in other words, if the jury finds that the use of deadly force was justified).

The primary flaw of the plaintiffs' supervisory liability claim against McAlpine is that it is disconnected from the issue of whether Officer Stutesman was or was not justified in his use of deadly force. Rather, plaintiffs posit that if McAlpine had ordered Stutesman to duck inside the Bearcat, pulled the other officers back, and utilized different tactics, the situation would have de-escalated and ended without any fatalities. This is speculative and also contrary to caselaw which establishes that the police are not required to use the least intrusive alternatives and need only act within the range of reasonable conduct. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994); *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994). There is no evidence that any of McAlpine's tactical decisions or actions fell outside the range of reasonableness, nor have plaintiffs proffered any expert opinions or testimony to that effect. *See Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991).

Furthermore, even if the jury were to find that the use of deadly force was not justified under the circumstances, there is no evidence that anything McAlpine did in his supervisory capacity at the scene caused or led to an *unjustified* use of force. To the contrary, the recorded dispatch logs establish that McAlpine and Grose (the officer hailing Babb over the loudspeaker) were exhorting Babb to exit the house unarmed.

Contrary to plaintiffs' assertion that McAlpine failed to contact Babb's therapist, the record reflects that he requested dispatch to ask the therapist to request Babb to come out of the house with nothing in his hands. The response of the therapist, as communicated by dispatch, was that Babb had a round loaded and it was ready to go. It was after this attempt to use the therapist to communicate with him that Babb appeared in the doorway and Officer Stutesman alone made the decision to use deadly force based on his observations. McAlpine was not in position to observe the actions of Babb, gave no order to use deadly force against him, and did not "cause others to inflict a constitutional injury."

As there exists no disputed material facts that affect the § 1983 claim against defendant McAlpine for supervisory liability, the defendants' motion for summary judgment against the sixth claim for relief should be granted.

### **CONCLUSION**


Defendants' motion for summary judgment (Document #31) should be granted in part and denied in part as follows:

1. Denied as to plaintiffs' first, second, and third claims under § 1983 against defendant Stutesman;
2. Granted as to plaintiffs' fifth claim for relief under § 1983 against the City of Eugene;

3. Granted as to plaintiffs' sixth claim for relief under § 1983 against defendant McAlpine for failure to supervise;
4. Denied as to plaintiffs' seventh claim for relief for the state law claim of wrongful death against the City of Eugene.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 28 day of March 2019.

  
Thomas M. Coffin  
United States Magistrate Judge